



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Marc E. Elias, Esquire
Rebecca H. Gordon, Esquire
Perkins Cole
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

NOV - 1 2007

Re: MUR 5869
Montanans for Tester
Brett DeBruycker, in his official capacity as treasurer

Dear Messrs Elias and Gordon:

On November 3, 2006, the Federal Election Commission notified your clients, Montanans for Tester and Brett DeBruycker, in his official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended, ("the Act"). On October 15, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Montanans for Tester and Brett DeBruycker, in his official capacity as treasurer, violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler", written over a horizontal line.

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **Matter Under Review 5869**

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5 **RESPONDENTS:** Montana Education Association-Montana Federation of Teachers
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7 Montana Democratic Party and
8 Brenda Schye, in her official capacity as treasurer
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10 Montanans for Tester and
11 Brett DeBruycker, in his official capacity as treasurer
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14 **I. INTRODUCTION**

15 This matter was generated by a complaint filed with the Federal Election Commission by
16
17 Trevis Butcher, Executive Director of Montanans In Action. *See* 2 U.S.C. 437g(a)(1).

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 This matter involves allegations that Montana Education Association-Montana Federation of
20 Teachers ("MEA-MFT"), a labor union of teachers and education employees, violated the Federal
21 Election Campaign Act of 1971, as amended, ("the Act") by using union treasury funds to make
22 expenditures that were coordinated with, and thus would constitute in-kind contributions to,
23 Montanans for Tester ("Tester Committee"), the principal campaign committee of Jon Tester, a U.S.
24 Senate candidate from Montana, and/or the Montana Democratic Party ("MDP") during the 2006
25 election cycle. Specifically, the complaint alleges that MEA-MFT's disbursements in support of
26 two Montana ballot initiatives (I-151, to raise Montana's minimum wage and I-153, an ethics
27 reform measure to change Montana's lobbying laws) were coordinated with the Tester Committee

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1 and/or the MDP.¹

2 The complaint alleges that essentially all MEA-MFT's disbursements in conjunction with
3 the ballot initiatives were coordinated with, and thus union in-kind contributions to, the Tester
4 Committee and/or the MDP. The complaint also alleges that as a result of these alleged in-kind
5 contributions, MEA-MFT was required to register with the Commission as a political committee,
6 and to report its receipts and disbursements.

7 Respondents all deny the complaint's allegations and note that complainant did not provide
8 information as to the content of any specific communication or voter drive effort to support the
9 allegations. All Respondents deny coordination of MEA-MFT disbursements made in connection
10 with the ballot initiatives. MEA-MFT states that it made no communication naming or referring to
11 Tester in conjunction with the ballot initiative. The Tester Committee and the MDP state that they
12 did not suggest, request, or provide MEA-MFT with any information regarding public
13 communications naming or referring to Tester.

14 The complaint generally alleges that MEA-MFT, Tester for Senate, and the MDP
15 coordinated their efforts to promote Tester's candidacy through Montana's minimum wage ballot
16 initiative.² The complaint cites to media reports of statements by a political strategist from a
17 "progressive" interest group who reportedly was quoted as stating, "The idea is to get more of our

¹ Although the complaint's allegations generally referred to MEA-MFT's contributions and disbursements made in support of both ballot initiatives, the complaint focused on the minimum wage ballot initiative and did not provide any relevant information concerning MEA-MFT's alleged activities on the anti-lobbying initiative. MEA-MFT provided affidavits from its President and Political Director stating that the organization did not support the anti-lobbying initiative, and the MDP separately confirmed MEA-MFT's asserted lack of involvement in the anti-lobbying initiative. Therefore, the discussion in this report focuses on MEA-MFT's alleged activities regarding the minimum wage initiative.

² The complaint cites a statement in the Commission's Explanation and Justification on Electioneering Communications, in which it recognized that a state ballot initiative could be used as a proxy to promote (or oppose) a federal candidate. See 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002).

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1 voters to the polls”³ See Complaint at 1. The strategist also was quoted as stating, “That kind
2 of effort can really draw voters out to not only support the minimum wage but to support the
3 candidates who support the minimum wage.”⁴ *Id.* The complaint alleges that Jim McGarvey,
4 Executive Secretary of the Montana AFL-CIO, with which MEA-MFT is affiliated, reportedly
5 stated that the union endorsed Tester because of his support for the ballot initiative.

6 The complaint asserts that the Democratic National Committee acknowledged using the
7 ballot initiative to promote Tester and to attack incumbent Senator Conrad Burns in a web blog
8 article relating to an August 8, 2006 rally in support of the initiative.⁵ See Complaint at 2. The
9 complaint alleges that the MDP paid field workers to generate support for both the ballot initiative
10 and Tester’s campaign. As evidence of coordination among the respondents, the complaint asserts
11 that an MDP field worker involved in the ballot initiative faxed an affidavit (in connection with an
12 unrelated proceeding) from the Tester Committee’s office. See Complaint at 3. In addition, the
13 complaint alleges that the coordinated strategy is further evidenced by the MDP’s federal disclosure
14 reports, which show federal disbursements for salary payments to one of the MDP operatives for

³ According to a newspaper article, the quote was attributed to Oliver Griswold of the Ballot Initiative Strategy Center, a Washington-based advocacy group. The article reported on the Democrats’ effort to include proposals to increase minimum wage on the ballots in six states, including Montana, in the hopes of boosting turnout among supporters. The article also reported that the Republicans were countering the Democrats’ effort by again trying to place anti-same sex marriage propositions on the ballot. However, the article did not mention Tester or his candidacy. See Alan Eisner, *Democrats to use minimum wage as election weapon*, Reuters, May 23, 2006

⁴ An earlier newspaper article, which also quoted Griswold and did not mention Tester or his candidacy, reported on efforts in 12 states to increase the minimum wage by legislation or ballot initiatives in the absence of congressional action. The article noted generally that, just as other measures had galvanized conservative voters in the 2004 election cycle, the states’ ballot initiatives could generally attract liberal voters to the polls. See Charisse Jones, *States aim to raise minimum wage*, USA Today, May 10, 2006.

⁵ The article did not mention Tester or his candidacy and appears focused on the dilemma facing then-Senator Burns in choosing between his opposition to raising the minimum wage and his support of federal estate tax, which were linked in a Senate bill. Pertinently, the article stated that “Senator Burns should join Democrats in fighting for a straight up or down vote on the minimum wage” and that “Democrats offer a new direction for America, where hard work is respected, and increasing the minimum wage and ensuring a secure retirement are top priorities.” See http://www.democrats.org/a/2006/08/will_burns_flop.php

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activities related to the ballot initiative as “Federal Election Activity Paid Entirely With Federal Funds.” The complaint further alleges that since MEA-MFT’s staff worked alongside the MDP’s operatives on the ballot initiative, MEA-MFT’s disbursements for the ballot initiative should be treated as having been coordinated with the MDP.

A. Coordination Standards

The Commission’s coordination regulations address both activity that does not qualify as a communication and communications. *See* 11 C.F.R. §§ 109.20 and 109.21. Based on the complaint and responses, the alleged coordination appears to involve communications relating to the ballot initiatives. A communication is considered coordinated under the Commission’s regulations if it meets the following three-pronged test: (1) payment by a third party, (2) satisfaction of one of four “content” standards, and (3) satisfaction of one of five “conduct” standards. 11 C.F.R. § 109.21⁶

1. Payment Prong

The complaint alleges that all of MEA-MFT’s disbursements in connection with the ballot initiative (e.g., salary payments, monetary contributions, and other disbursements) were coordinated with the Tester Committee or the MDP based on the alleged strategy to use the ballot initiatives to further Tester’s candidacy. MEA-MFT acknowledges making a \$10,000 contribution to the Raise Montana Committee to Increase the Minimum Wage (“Ballot Committee”), the ballot committee that was formed to promote the minimum wage initiative, and independently making in-kind contributions to the Ballot Committee totaling \$18,000 in connection with the ballot initiative.

⁶ Even if the alleged minimum wage ballot initiative activities are not considered communications, it does not appear that the alleged activities were coordinated under 11 C.F.R. § 109.20. As discussed below, the available information does not indicate that MEA-MFT cooperated, consulted or acted in concert with, or at the request or suggestion of, the Tester Committee or the MDP in conducting the minimum wage ballot initiative activities. *See* 11 C.F.R. § 109.20(a). As previously stated in this report, MEA-MFT provided affidavits from its officials and from the co-founder of the Ballot Committee attesting that it acted independently of the Tester Committee and the MDP; it claimed it acted consistent with its longstanding commitment to raise the minimum wage in Montana.

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1 According to MEA-MFT, the in-kind contributions consist of expenses and salary of MEA-MFT's
2 staff and officers for signature gathering, attending public rallies or meetings, issuing
3 communications to its membership and to the public about signature gathering that did not mention
4 either Tester or the MDP,⁷ issuing media communications in support of the ballot initiative, and
5 defending an unrelated lawsuit that complainant filed challenging MEA-MFT's signature gathering
6 efforts for the ballot initiative.⁸ However, as discussed below, it does not appear that any MEA-
7 MFT communications meet the other prongs of the coordination test

8 2. Content Prong

9 The content prong of the coordination test requires that the communication at issue meet at
10 least one of four content standards: (1) an electioneering communication,⁹ (2) a public
11 communication that disseminates campaign materials prepared by a candidate,¹⁰ (3) a public
12 communication that expressly advocates the election or defeat of a clearly identified federal

⁷ The Act and Commission regulations exclude communications by a labor organization to its members and their families from the definitions of contribution and expenditure. 2 U.S.C. § 441b(b)(2)(A), 11 C.F.R. §§ 100.134(a) and 114.1(a)(2).

⁸ MEA-MFT stated that a small amount of money, about \$500, was spent to pay members and other individuals to gather signatures for the ballot initiative at the polls in May 2006 for school levy elections, in June 2006 for the primary election, and on other isolated occasions.

⁹ The term "electioneering communication" means any broadcast, cable, or satellite communication which—(1) refers to a clearly identified candidate for Federal office, (2) is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (3) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29

¹⁰ The Act defines the term "public communication" as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22).

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1 candidate, and (4) certain public communications, distributed 90 days or fewer before an election,
2 which refer to a clearly identified federal candidate (or political party).¹¹ 11 C.F.R. § 109.21(c).

3 The available information does not show that any MEA-MFT communication satisfied the
4 content prong of the coordination test. The complaint neither provides nor identifies any
5 communications made by MEA-MFT that would meet one or more of the content standards. The
6 only specific items the complaint mentions are public statements by an unidentified individual (an
7 alleged strategist of a "progressive" interest group) that "the Democrats" intended to use various
8 state ballot initiatives to generate support for Democratic Party candidates and a public statement by
9 the executive secretary of the Montana AFL-CIO stating that the organization endorsed Tester
10 partly based on his support for the ballot initiative. The complaint also cites to a similar statement
11 in a flyer on the website of the national AFL-CIO's separate segregated fund. However, neither
12 statement identifies any MEA-MFT communications that satisfy the content standard. Further,
13 MEA-MFT's response, supported by affidavits of its officials, specifically states that it did not issue
14 any electioneering communication, public communication that disseminates campaign materials
15 prepared by either the Tester Committee or the MDP, public communication that expressly
16 advocates Tester's candidacy, or public communication that was distributed either 90 or 120 days or
17 fewer before Montana's primary or general elections that refers to Tester. See MEA-MFT

¹¹ The Commission revised the content, and other coordination, standards effective July 10, 2006. See 71 Fed. Reg. 33190. Among other revisions, those revised regulations reduced the distribution time frame for a public communication that refers to a clearly identified Senate candidate from 120 days or fewer to 90 days or fewer. See 11 C.F.R. § 109.21(c) (2006). The revised regulations are applicable to this matter because the complainant's allegations overlap the period of the old and the revised regulations. The U.S. District Court for the District of Columbia recently held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act and the Commission's firewall safe harbor provision failed Chevron Step 2 analysis and violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, --- F.Supp.2d ---, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)).

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1 Response at 3. In fact, one of the two co-founders of the Ballot Committee affirmed that the Ballot
2 Committee itself did not make any communications to the public either naming or referring to
3 Tester or his candidacy, or the MDP. *See* Bullock Affidavit at 2 Similarly there is no information,
4 which suggests that any specific MEA-MFT communication referred to Tester's opponent.

5 **3. Conduct Prong**

6 The conduct prong of the coordination test is satisfied if, among other things, the federal
7 candidate, the candidate's authorized committee, or one of their agents discuss, request, or suggest a
8 communication, or is materially involved in a decision regarding the content of the communication
9 in some way.¹² The complaint provides no information to indicate that any of the respondents or
10 their agents engaged in any activities that satisfy any of the conduct criteria The complaint appears
11 to point to the faxing of an unidentified Democratic operative's affidavit (in connection with an
12 unrelated proceeding) from the Tester Committee's office as possible evidence of coordination.
13 However, as the Tester Committee pointed out, the complaint does not allege that the operative was
14 an agent of the Tester Committee or the Ballot Committee, or that the operative engaged in any
15 substantive activity that would satisfy any of the Commission's conduct criteria. The complaint
16 further points to the fact that MDP paid canvassers with funds from its federal account for signature
17 gathering and other activities related to the ballot initiatives as evidence of a coordination scheme.
18 MDP points out that its payments were consistent with the Act's requirements for employees who
19 spend more than 25% of their compensated time on federal electoral activities. *See* 11 C.F.R.

¹² The conduct standards include. (1) communications made at the "request or suggestion" of the relevant candidate or committee or at the suggestion of the person paying for the communication and the relevant candidate or committee assents to the suggestion; (2) communications made with the "material involvement" of the relevant candidate or committee; (3) communications made after "substantial discussion" with the relevant candidate or committee; (4) specific actions of a "common vendor"; and (5) specific actions of a "former employee " 11 C.F.R. § 109.21(d)(1)-(5) *See also* 11 C.F.R. § 109.21(d)(6)

1 § 106.7(d)(1)(ii). Such disclosure by itself does not demonstrate that the MDP staff's activities
2 were to promote Tester's candidacy, let alone that the activities were coordinated

3 Significantly, respondents have denied making or being involved in any joint public
4 communications promoting Tester's candidacy. *See* Sworn Affidavits attached to MEA-MFT's and
5 the Tester Committee Responses, and the MDP's Response. In fact, the MEA-MFT claims that it
6 acted independently of the Tester Committee and the MDP in its support for an increase of
7 Montana's minimum wage, and the MDP maintains that it had no significant involvement with the
8 minimum wage ballot initiative.¹³ MEA-MFT provided a sworn affidavit from the co-founder of
9 the Ballot Committee affirming MEA-MFT's claims concerning its independence. *See* MEA-
10 MFT's Response, Affidavit of Stephen Bullock. MEA-MFT specifically denies that its
11 representatives or agents or those of the Tester Committee or the MDP conveyed any information
12 about the plans, projects, activities, or needs of their respective organizations to each other.¹⁴ It also
13 provided sworn affidavits from its President, Executive Director, and Political Director to support
14 its claims. *See* Attachments to MEA-MFT's Response.

15 **B. Conclusion**
16

17 In conclusion, though the complaint correctly points out that the Commission recognizes
18 that a ballot initiative can be used as a proxy to promote (or oppose) a federal candidate, it does not
19 provide any information, and there is no information otherwise available, indicating that

¹³ MEA-MFT claims that it has publicly supported increasing Montana's minimum wage since at least 1983 and that it acted independently of the Ballot Committee. *See* MEA-MFT Response at 1-2. MEA-MFT explained that the Ballot Committee was formed and controlled by two individuals who were Board members of Raise Montana, a non-profit organization under 501(c)(4) of the Internal Revenue Code, that was formed to educate the public on issues concerning wages and working conditions. It pointed out that the two individuals had no relationship to MEA-MFT and that it exercised no direction or control over the activities, expenditures, or communications of the two individuals, the Ballot Committee, or Raise Montana.

¹⁴ MEA-MFT also pointed out that most of its signature-gathering was conducted prior to the June 6, 2006 primary election, when Tester became the Democratic nominee, and prior to its endorsement of his candidacy.

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1 respondents may have coordinated their activities with the Tester Campaign within the meaning of
2 11 C.F.R. S 109.21 in connection with the minimum wage ballot initiative.¹⁵ Consequently,
3 respondents' disbursement for the minimum wage ballot initiative would not constitute prohibited
4 or excessive in-kind contributions to the Tester Committee and would not potentially make MEA-
5 MFT subject to the Act's registration and reporting requirements. Accordingly, the Commission
6 finds no reason to believe that Montana Education Association-Montana Federation of Teachers,
7 Montana Democratic Party and Brenda Schye, in her official capacity as treasurer, and Montanans
8 for Tester and Brett DeBruycker, in his official capacity as treasurer, violated the Act in this matter.

¹⁵ The Commission's statement supported its decision not to exempt ballot initiatives or referenda from the electioneering regulations. *See* 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002); AO 2003-12 at footnote 10. Contrary to his assertion, the Commission's statement does not support complainant's broad conclusion that "efforts to support ballot measures that are identified with a certain party and candidate are essentially efforts to support that candidate." *See* Complaint at 1.

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